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PRESCRIPTIVE EASEMENTS AND WAYS OF NECESSITY

Prepared for the Eminent Domain Subcommittee of the Environmental Quality Council
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Eminent domain is a constitutionally recognized power to take private property for a public use. Acquisition of property through the use of eminent domain requires just compensation to the private property owner. Private property may also be acquired through adverse possession or a prescriptive easement. Compensation of the landowner from whom the property is taken is not required in an adverse possession or prescriptive easement situation. A way of necessity is a form of easement that is created by the actions of the landowner in severing a portion of the landowner's property.

There has been a substantial interest in prescriptive easements in recent years as indicated by the number of Montana Supreme Court decisions involving the issue. The rise in efforts to acquire prescriptive easements is almost certainly linked to changes in historic land use. As land use patterns have changed, concepts such as customary usage of others' land and neighborly accommodation have also changed. Concerns with private property rights and governmental action have also added to increased interest in preserving or denying what were traditional means of access.

Prescriptive Easements

Adverse possession is a method of acquisition of title to property by possession for a statutory period under certain conditions. Adverse possession is statutorily addressed in Title 70, chapter 19, part 4, MCA. A prescriptive easement is a form of adverse possession. However, a prescriptive easement provides only a right to use the property of another for a limited purpose,

while adverse possession is a method of acquiring title to property. Both adverse possession and prescriptive easement actions require proof of open, notorious, exclusive, adverse, and continuous possession or use for the statutory period of 5 years. See Shors v. Branch, 221 Mont. 390, 720 P.2d 239 (1986). A prescriptive easement is created by operation of law in Montana. Swandal Ranch Co. v. Hunt, 276 Mont. 229, 915 P.2d 840 (1996). A prescriptive easement may be either public or private. The payment of taxes on the property in question is required for adverse possession, but is not required to establish a prescriptive easement. Murphy v. Atlantic Richfield Co., 221 Mont. 166, 717 P.2d 558 (1986).

In order to create a public right-of-way by prescription, the evidence must establish that the public has pursued a definite fixed course, continuously and uninterruptedly, and coupled it with an assumption of control and right of use adversely under a claim or color of right for the statutory period of time. Descheemaeker v. Anderson, 131 Mont. 322, 310 P.2d 587 (1957). Adverse use by the public, combined with the grading and maintaining of a road without the landowner's permission, is sufficient to establish adverse control. Rasmussen v. Fowler, 245 Mont. 308, 800 P.2d 1053 (1990).

Required elements

As discussed, prescriptive easement actions require proof of open, notorious, exclusive, adverse, and continuous possession or use for the statutory period of 5 years. The burden is on the party seeking to establish the prescriptive easement, and all elements must be proved. Tanner v. Dream Island, Inc., 275 Mont. 414, 913 P.2d 641 (1996). In Zavarelli v. Might, 230 Mont. 288, 749 P.2d 524 (1988), the court found that the required elements for a prescriptive easement could not be met while a property boundary line was unascertained. The property owner could not know that a trespass was committed until a survey of the property was complete. The court also stated that a party cannot both own the land and have a prescriptive easement in the land. The alleged easement would merge in the land title.

Open and notorious

This element requires a distinct and positive assertion of a right hostile to the rights of the owner and brought to the attention of the owner. Lemont Land Corp. v. Rogers, 269 Mont. 180, 887 P.2d 724 (1994).

In Blasdel v. Montana Power Co., 196 Mont. 417, 640 P.2d 889 (1982), plaintiffs owned a farm surrounded on three sides by the Flathead River and Flathead Lake. After Kerr Dam was built in 1939, the water table in the area began to rise. In 1960, plaintiffs filed suit claiming inverse condemnation of their land and damages because of the rising of the water table. The complaint was amended four times over the years and was finally tried in 1979. Defendant claimed that the cause was barred by prescription and the statute of limitations. Defendant failed to establish

prescription. Defendant did not show "open and notorious" occupation of the land for any period of time and had consistently denied occupation of the land. Defendant also failed to show an intention to occupy the land. Intention is a central element of prescriptive easements.

Exclusivity

This element does not mean that no one else may use the easement in question. It merely means that the right of the person claiming the easement does not depend on the same right residing in others. A claimant's right may be exclusive even though the owner of the servient estate uses the easement, so long as that use does not interfere with the use by the claimant. The owner of the servient estate may use the property in any manner and for any purpose consistent with the use of the easement by the claimant. Wareing v. Schreckendgust, 280 Mont. 196, 930 P.2d 37 (1996), citing Hays v. DeAtley, 65 Mont. 558, 212 P. 296 (1923).

In Warnack v. Coneen Family Trust, 266 Mont. 203, 879 P.2d 715 (1994), the lower court ruled that a prescriptive easement existed for Dawson even though he was not a party to the lawsuit. The Supreme Court held that a person who is not a party to an action may not be a party to the judgment. That holding was followed in Kessinger v. Matulevich, 278 Mont. 450, 925 P.2d 864 (1996), in which the court again stated that a person who is not a party to the action cannot be a party to the judgment. Therefore, in a prescriptive easement action, witnesses who lived in the area of the disputed road and testified as to their use of the road could not be granted a prescriptive easement because they were not parties to the action.

Adversity

The sticking point in prescriptive easement cases is often "adversity". In order to show that the use of a claimed easement is adverse, the claimant must prove that the use is exercised under a claim of right and not as a mere license or privilege revocable by the owner of the land. The claim of right must be known to and acquiesced in by the owner of the land. Rappold v. Durocher, 257 Mont. 329, 849 P.2d 1017 (1993). If the use of another person's property begins as a permissive use, it cannot ripen into a prescriptive right no matter how long it continues, unless there is a distinct and positive assertion of a right hostile to the owner. Robertson v. Hughes, 204 Mont. 515, 668 P.2d 1025 (1983). A landowner's uncorroborated assertions of permissive use are insufficient to overcome witnesses' testimony establishing the open, notorious, exclusive, adverse, continuous, and uninterrupted use of the easement. Thomas v. Barnum, 211 Mont. 137, 684 P.2d 1106 (1984).

In Rathbun v. Robson, 203 Mont. 319, 661 P.2d 850 (1983), Rathbun attempted to establish western access to his land by means of a prescriptive easement. The District Court found use of the route permissive, thereby defeating a prescriptive easement. Evidence was introduced to show that it was customary in homesteading days to allow the neighbors access across another's land. Permission was automatic if the individual closed the gates and respected the property.

Several gates were established and maintained across the access. The Supreme Court determined that evidence of local custom coupled with the existence of gates clearly supported the District Court's conclusion that use of the western access was always permissive. Rathbun was followed in Public Lands Access Association, Inc. v. Boone & Crockett Club Foundation, Inc., 259 Mont. 279, 856 P.2d 525 (1993), Greenwalt Family Trust v. Kehler, 267 Mont. 508, 885 P.2d 421 (1994), Kessinger, and Rettig v. Kallevig, 282 Mont.189, 936 P.2d 807 (1997). When there is a community understanding or a local custom of allowing neighbors to cross the edges of property, it is considered permission. Greenwalt. Rathbun and Public Lands Access Association, Inc., were followed in Swandal.

In McClurg v. Flathead County Commissioners, 188 Mont. 20, 610 P.2d 1153 (1980), the Supreme Court held that "adverse control" is presumed when all other elements necessary for a prescriptive easement have been established. In McClurg, the public had used a road in a continuous and uninterrupted way for over 25 years without objection by the McClurgs. McClurgs sought unsuccessfully to close the road to public use. The undisputed facts supported rather than rebutted the presumption of adverse use. For example, most members of the public never asked for permission to use the road, and the county graded and maintained the road and laid gravel on the road without the McClurgs' permission. McClurg was distinguished in Leffingwell Ranch, Inc. v. Cieri, 276 Mont. 421, 916 P.2d 751 (1996), in which work on a road was based on courtesy and cooperation with local ranchers and not public duty.

Continuous and uninterrupted use

This element requires a use that is made often enough to constitute notice to the potential servient owner and that is not interrupted by the act of the landowner or by voluntary abandonment by the party claiming the easement. Lemont, citing Downing v. Grover, 237 Mont. 172, 772 P.2d 850 (1989). The definitions provided in Downing were also cited in Rappold.

Burden of proof -- evidence

After a claimant has established the preliminary requirements for a prescriptive right, a presumption of adverse use arises. The burden then shifts to the owner of the land on which the prescriptive easement is claimed to establish permissive use or license. If an owner establishes that the use is permissive, an easement may not be acquired. In Lemont, no genuine issue of material fact existed with regard to defendant's open, notorious, continuous, uninterrupted, and exclusive use of a road access for the statutory period. Therefore, the presumption of adverse use was applicable. Plaintiff failed to raise material facts regarding whether the use was permissive, including questions of permission or license, control of access by use of a gate, and neighborly accommodation. Defendant was therefore entitled to summary judgment based on adverse use as a matter of law. Lemont distinguished Public Lands Access Association, Inc.

In Wareing, the Supreme Court held that the proper burden of proof is that each element of a prescriptive easement claim be proved by clear and convincing evidence. Wareing overruled Downing and earlier decisions requiring that the elements of a prescriptive easement be proved by a preponderance of the evidence. The Wareing decision stated that clear and convincing evidence is evidence that is definite, clear, and convincing. The quality of proof is somewhere between the rule in ordinary civil cases and the rule in criminal cases. The evidence must be more than a preponderance but is not required to be beyond a reasonable doubt.

Warnack partially overruled Scott v. Weinheimer, 140 Mont. 554, 374 P.2d 91 (1962), in which the lower court had awarded the plaintiff a prescriptive easement based upon the unexplained use of the road by the plaintiff and the plaintiff's predecessors. The Supreme Court recognized that the lower court had based its decision on dicta found in certain earlier decisions but ruled that a prescriptive easement may be established only by proving open, notorious, exclusive, adverse, continuous, and uninterrupted use.

The claimant of a prescriptive easement is entitled to rely upon a presumption that the use was adverse to the servient owner's title if the claimant demonstrates by the evidence the other elements of the claim. When the dominant owner makes this preliminary showing of open, notorious, continuous, and unmolested use for the statutory period, the burden falls on the owner of the servient tenement to show that the use was not adverse but merely permissive. Garrett v. Jackson, 183 Mont. 505, 600 P.2d 1177 (1979), following Luoma v. Donohoe, 179 Mont. 359, 588 P.2d 523 (1978). See also Rappold, Unruh v. Tash, 271 Mont. 246, 896 P.2d 433 (1995), and Rafanelli v. Dale, 278 Mont. 28, 924 P2d 242 (1996). Unruh was followed in Glenn v. Grosfield, 274 Mont. 192, 906 P.2d 201 (1995).

In Rathbun, as previously noted, evidence was introduced to show that it was customary in homesteading days to allow the neighbors access across another's land. Permission was automatic if the individual closed the gates and respected the property. Several gates were established and maintained across the access. The evidence of local custom coupled with the existence of gates clearly supported the trial court's conclusion that use of the western access was always permissive. However, evidence that gates are used to control cattle rather than traffic is insufficient to rebut the presumption of adverse use. Parker v. Elder, 233 Mont. 75, 758 P.2d 292 (1988).

In Madison County v. Elford, 203 Mont. 293, 661 P.2d 1266 (1983), the evidence presented established that several of defendants' neighbors used the road across defendants' land, but witnesses also testified that defendants had consented to the use. Evidence was also presented that there were gates across the road posted with "No Trespassing" signs. This kind of use is not adverse and does not create a public prescriptive easement.

In Oates v. Knutson, 182 Mont. 195, 595 P.2d 1181 (1979), the existence of county records to the effect that the road in question was a county road was not sufficient to initiate acquisition of a prescriptive right. Prescriptive easements are acquired by adverse use, not by keeping records.

In Amerimont, Inc. v. Gannett, 278 Mont. 314, 924 P.2d 1326 (1996), and Amerimont, Inc. v. Anderson, 278 Mont. 495, 926 P.2d 688 (1996), the property owners and their predecessors in interest exercised complete dominion and control over the road in question. The road was used not only to control livestock, but also to restrict access to the property and to protect the property from theft. Any use of the road was by express or implied permission of the landowners, according to a community understanding or local custom of accommodating neighbors' use of the road. This pattern of neighborly accommodation persisted for years. Because use of the road was not adverse, it could not ripen into a prescriptive easement.

Nature of interest acquired

The use of a prescriptive easement is governed by the character and extent of the use during the period requisite to acquire it. Ferguson v. Standley, 89 Mont. 489, 300 P. 245 (1931). Montana has not adopted sections 478 and 479 of the Restatement of Property allowing greater use of a prescriptive easement over time. See Warnack.

The nature of the right to use a roadway cannot exceed the use that was made of the roadway during the prescriptive period. When it is shown that other persons participated in the use of the roadway, a person cannot establish a private or exclusive easement. Marta v. Smith, 191 Mont. 179, 622 P.2d 1011 (1981). Marta also held that the District Judge properly denied plaintiffs' request for an injunction and their claim for damages for rutting and disrepair of the roadway when the testimony showed that plaintiffs kept the roadway up despite use of it by defendants and that defendants' use of the roadway was consistent with defendants' interest in the land.

A person who purchases property that is subject to a prescriptive easement may not interfere with the use of the easement by the person holding the easement. The person holding the easement is entitled to enjoin the purchaser from interfering with the use of a road easement. Weinheimer was overruled in Grosfield to the extent that it suggested that a prescriptive easement can be relocated by verbal or tacit consent. In Grosfield, the facts indicated that for nearly 100 years, access to Glenn's property was across the "old road" that crossed Grosfields' land. The parties agreed that Glenn and her neighbors had established a prescriptive easement by use of the "old road". After 1992, Glenn quit using part of the old road and began using a "new road" across another part of Grosfields' land. All of the property owners, including Grosfields, used the new road for approximately 2 years, until Grosfields placed barbed wire across it. Glenn brought an action to enjoin Grosfields from placing the fence across the new road. The Supreme Court held that the location of a prescriptive easement cannot be changed by mutual consent of the parties, tacit or otherwise, and that because Glenn did not otherwise satisfy the requirements for a prescriptive easement on the new road, the District Court erred in granting the injunction against Grosfields, the property owners. Grosfield was followed in Rafanelli.

Duration of interest

When a claimant's prescriptive easement has fully ripened, it is not necessary to once again establish the claim after transfer of the servient tenement. Prescriptive title once established is not divested by transfer of the servient estate. Garrett v. Jackson, 183 Mont. 505, 600 P.2d 1177 (1979), following Ferguson v. Standley, 89 Mont. 489, 300 P.2d 245 (1931).

A prescriptive easement may be extinguished by the owner servient tenement. In Shors, the Supreme Court found insufficient evidence of extinguishment of easement rights by adverse possession or prescriptive right to a gate when: (1) there was not consistent testimony that the owner intended to eliminate all access to the easement; (2) the owner stated that he would have given lot owners keys to the gate if they had wished to improve the access road; (3) there was limited entry around the gate by snowmobile, by motorcycle, or on foot; (4) the gate was sometimes left open; (5) a declaration of restrictions remained on file stating the easement right; (6) "no trespassing" signs were not placed near the gate for at least 4 years after the gate was installed; and (7) the owner never affirmatively conveyed to the lot owners at any date certain the owner's intention that they not go beyond the gate.

Recreational use

Only one Montana statute specifically addresses prescriptive easements. Section 23-2-322(1), MCA, provides that a prescriptive easement is a right to use the property of another that is acquired by open, exclusive, notorious, hostile, adverse, continuous, and uninterrupted use for a period of 5 years. The statutory provisions are consistent with the holding in cases such as Garrett and Stamm v. Kehrer, 222 Mont. 167, 720 P.2d 1194 (1986), in which the Court held that to establish a prescriptive easement, the owner of the purported dominant tenement (prescriptive easement) must establish open, notorious, exclusive, adverse, continuous, and unmolested use of the servient tenement (other person's property) for the full statutory period of 5 years required to acquire title by adverse possession.

Section 23-2-322(2), MCA, precludes the public from gaining a prescriptive easement pursuant to the stream access laws. That provision is also consistent with judicial decisions, such as Granite County v. Komberec, 245 Mont. 252, 800 P.2d 166 (1990), in which the Supreme Court determined that recreational use alone was not enough to establish a prescriptive easement. However, in Komberec, there was other evidence of use that was determined sufficient to establish the easement. In Medhus v. Dutter, 184 Mont. 437, 603 P.2d 669 (1979), the Supreme Court determined that the occasional use of a road by hunters, hikers, and neighbors (recreational use) was insufficient to raise a presumption of adverse use and did not represent the distinct and positive assertion of a hostile right notifying the owner of the property, which is necessary to transform the originally permissive use into adverse use. The court stated that in order to find a prescriptive easement, those claiming the easement must make a distinct and positive assertion of a right to use the property that is hostile to the owner's rights. The person claiming the easement

must also show that the right was brought to the attention of the owner and that there was continued use of the easement for the full statutory period.

Governmental issues

In Swandal, the ranch company brought an action to quiet title to a stretch of roadway, known as Wallrock Road, running through the ranch. The District Court held that Park County had established a public easement by prescription. The Supreme Court held that Park County had satisfied the requirements for a prescriptive easement, noting that a declaration by the county in 1950 of its intent to create a public road by statutory process and subsequent newspaper publication of the minutes of the County Commissioners' meeting put the Swandals on notice of the county's interest in Wallrock Road, even though the intent of the Commissioners had been to create the public road by a different process. The Supreme Court also found that county maintenance of the road had not been intermittent and that there was sufficient evidence that use of the road was not by neighborly accommodation. Swandal was followed in Rafanelli.

In a different type of usage case, the city of Helena openly and visibly constructed a water supply line across land owned by plaintiff's predecessor in interest outside of the easement granted to the city. The Supreme Court found that the city's use was sufficiently open and notorious to support the District Court's finding of a prescriptive easement. Prescriptive title once established is not divested by transfer of the servient estate, and the fact that plaintiff's title search and title insurance policy and visual inspection of the property did not indicate the presence of the pipeline was immaterial. Riddock v. Helena, 212 Mont. 390, 687 P.2d 1386 (1984).

In a subdivision case, defendants developed a subdivision. Plaintiff, an adjoining landowner, sold parcels of the adjoining land to his brother and another party. The subdivision developers objected to plaintiff and his successors using the subdivision for access to their tracts. The parties could not agree on conditions of usage, and the developers attempted various methods of blocking plaintiffs' access through the subdivision. Plaintiffs sought damages from blocked access and a prescriptive easement. Defendant contended that plaintiffs had intentionally violated state and local subdivision laws in the land transfers and that allowing them access would sanction the alleged illegal action. Defendant also contended that the trial court should not have excluded evidence of the alleged violation of subdivision laws. On appeal, the Supreme Court found nothing in Montana subdivision law that prevented an individual who has developed property contrary to law from pursuing a claim against an adjoining subdivision for right of access. Public authorities must deal with any improprieties in development. The evidence was properly excluded as irrelevant. Smith v. Moran, 215 Mont. 31, 693 P.2d 1246 (1985).

A defendant who had claimed a prescriptive easement was found guilty of intentional trespass, and damages were awarded to the plaintiff. Ordinarily, a person is liable for trespass even though the person has acted in good faith and believes that the person has the legal privilege of entry. Luoma.

Ways of Necessity

An easement may be created by grant, reservation, exception, or covenant, by implication, or by prescription. Kuhlman v. Rivera, 216 M 353, 701 P2d 982 (1985), followed in Ducham v. Tuma, 265 Mont. 436, 877 P.2d 1002 (1994).

An easement by necessity is a subspecies of an easement by implication, that arises through strict necessity for exit and access to a parcel of property. Graham v. Mack, 216 Mont. 165, 699 P.2d 590 (1984). A way of necessity is a method of acquiring access to property for which there is no other access. A way of necessity is incompatible with a prescriptive right for the same easement. A prescriptive right never accrues in a way of necessity as long as the necessity continues.

In Graham, a landowner brought an action to quiet title to real property that he purchased from another and a neighbor sought to establish an easement over the land. The Supreme Court held that: (1) a prescriptive easement was not established because the neighbor's use of the land was not continuous; (2) an easement by implication did not arise because unity of ownership did not exist and intent of the parties was not established; and (3) an easement by necessity did not exist because the property was not originally under common ownership. Graham stated that in order for an easement by implication to be established, there must be: (1) separation of title; (2) a long-standing, obvious use before the separation of title that shows that the use was meant to be permanent; and (3) necessity of the easement for the beneficial enjoyment of the land granted or retained. Graham was followed in Ruana v. Grigonis, 275 Mont. 441, 913 P.2d 1247 (1996), and Big Sky Hidden Village Owners Association, Inc. v. Hidden Village, Inc., 276 Mont. 268, 915 P.2d 845 (1996). In Wangen v. Kecskes, 256 Mont. 165, 845 P.2d 721 (1993), the court applied the Graham test to find an easement by implication even though the court emphasized that an implied easement is to be considered with extreme caution because it creates a servitude through mere implication.

In order for a way of necessity to exist, the way must: (1) have existed prior to or at the time of the severance of the sold land; and (2) run over land, granted or reserved by the same grantor, over which there was access to a public road. Schmid v. McDowell, 199 Mont. 233, 649 P.2d 431 (1982). There are two basic elements of easements by way of necessity: (1) unity of ownership; and (2) strict necessity. Unity of ownership is required because the landlocked parcel must have been owned by the person who severed the landlocked tract. The necessity must exist at the time that the unified tracts are severed. The way of necessity must be over the grantor's land and never over the land of a third party or stranger to the original unified title. Courts are reluctant to find easements by implication because such an action results in depriving a person of the use of the person's property by imposing a servitude by mere implication. To create an easement by implication from a preexisting use imposed on one part of the property for the benefit of another party, unity of title at the time of the severance thereof is required. Woods v. Houle, 235 Mont. 158, 766 P.2d 250 (1988). Woods was followed in Big Sky.

In Schmid, Junkins sold a parcel of land to the defendants' predecessors in interest. The land was surrounded by other property, including state and railroad lands, and there was no access to it. The plaintiffs subsequently purchased property immediately behind the defendants' land. The District Court did not err in finding that no way of necessity in favor of the plaintiffs existed across the defendants' land. In order for a way of necessity to exist, the way must: (1) have existed prior to or at the time of the severance of the sold land; and (2) run over land, granted or reserved by the same grantor, over which there was access to a public road. In this case, a third party, the State of Montana, owns land over which the way is alleged to run and, additionally, there was no access to or from a public road at the time of the conveyance. The prerequisites for a way of necessity did not exist. Schmid was followed in Peters v. Johnson, 203 Mont. 120, 661 P.2d 24 (1983), Rathbun, and Big Sky.

Conclusion

Changes in historic land use have eroded concepts such as customary usage of others' land and neighborly accommodation. The changes have created additional pressure for access to land. This pressure has been reflected in recent legislative efforts. In the 1995 session, Representative DeBruycker introduced House Bill No. 290 to provide a method of providing access to isolated land. The bill was based on a similar Nebraska law. In the 1999 session, Representative Noennig introduced House Bill No. 28 to revise the laws concerning private condemnation proceedings for the opening of private roads over private lands. Section 70-30-102, MCA, currently provides that a "pubic use" for purposes of condemnation is limited to private roads leading from highways to residences or farms. The Montana Supreme Court has limited rights of private condemnation of access roads to cases in which the owner's land is presently being used as a farm or residence. Groundwater v. Wright, 180 Mont. 27, 588 P.2d 1003 (1979). The Montana Supreme Court has further limited condemnation rights by defining "farm" as land cultivated for purposes of agricultural production. Richter v. Rose, 1998 MT 165, 289 Mont. 379, 962 P.2d 583 (1998). Because changes in historic land use are continuing, it is likely that efforts will also continue to provide additional methods for acquiring access to land.

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